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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead Case No. 08-99000-smb

4 Case No. 08-01789-smb

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6 In the Matter of:

7 SECURITIES INVESTOR PROTECTION CORPORATION,

8 Plaintiff,

9 v.

10 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

11 Defendants.

12

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, NY 10004

17

18 July 25, 2018

19 10:10 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

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1 HEARING re Conference re Motion for an Order Establishing
2 Omnibus Proceeding for the Purpose of Determining the
3 Existence, Duration and Scope of the Ponzi Scheme at BLMIS

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1 P R O C E E D I N G S

2 THE COURT: Go ahead.

3 MS. BELL: Good morning, Your Honor. Stacey Bell,
4 counsel for the Trustees, BakerHostetler. Your Honor, we're
5 here on a status conference on the Trustee's motion for an
6 order establishing an omnibus proceeding on the existence,
7 duration, and scope of the Ponzi scheme at BLMIS. Since the
8 last time we were here, we've refiled that motion, and so
9 now we're here on an omnibus Ponzi pretrial proceeding.

10 If this Court will recall, the Trustee filed a
11 motion in February seeking to consolidate the remaining good
12 faith actions on the issue -- on the Ponzi issue. And in
13 response to the Trustee's motion, the Trustee received a
14 number of objections. 106 cases filed objections. There
15 were eight law firms. We've since -- that number has since
16 dropped to seven law firms with 105 cases at issue.

17 So, a month ago, the parties appeared before Your
18 Honor to update the Court on the status of the negotiations.
19 And at that time, the Trustee reported that since receiving
20 the Defendant's objections, the parties had been engaged in
21 negotiations seeking to streamline the issues for the Court.
22 More specifically, the parties were engaged in discussions
23 about a consolidated proceeding that would address discovery
24 only, tabling issues of trial and dispositive motions for a
25 later date.

1 Based on the progress that the parties had made
2 during the course of their negotiations, as of the last
3 hearing, the Trustee expressed optimism that we would be
4 able to enter into a revised consensual order. And the
5 objecting parties agreed with the Trustees -- the Trustee
6 and acknowledge the progress that the parties had made to
7 date.

8 Subsequent to the hearing, Your Honor, the Trustee
9 sent a revised proposed order to the Defendants. That is
10 the order that is now before the Court. And the revised
11 order, as I stated before, we refiled a pretrial order
12 because we significantly limited -- and it indicated the
13 substantial overhaul and changes between the initial order
14 and the revised order.

15 The Trustee's counsel had a meeting with
16 Defendants with the objecting Defendants, where it was our
17 hope that we would continue in the same vain as the initial
18 rounds of discussions, making progress towards a consensual
19 order.

20 At the meeting, as reflected in our reply papers,
21 the objecting Defendants informed the Trustee that they
22 could not agree to the order because as a threshold matter,
23 discovery was closed in a majority of their cases and the
24 fact, of course -- discovery renders this proceeding
25 problematic.

1 In the Defendant's view, the only cases that could
2 proceed on this consolidated basis would be cases where fact
3 discovery is open under the CMO. The Trustee obviously --

4 THE COURT: How many of those?

5 MS. BELL: There are about seven or so cases, Your
6 Honor, and I'll go through those categories in just a
7 moment. But there are seven cases in the Trustee's view
8 that are open with -- under the existing CMOs. The Trustee
9 disagrees with Defendant's position, and we decided to file
10 a motion or a reply just in accordance with the Court's
11 directive at the last hearing, that that reply be put in by
12 July 18th.

13 The day before the filing, the Trustees received -
14 - the Trustee received comments to our proposed order, and
15 those comments highlighted and confirmed how far apart the
16 parties were. In the Trustee's view, we've accommodated and
17 we've sought to accommodate the Defendant's position vis-à-
18 vis our proposed revised order on what a restructured
19 omnibus Ponzi proceeding could look like. And we think that
20 the revised order is judicially efficient and it streamlines
21 the discovery process going forward on the Ponzi issue.

22 And so, Your Honor, I want to talk just a bit
23 about how the Trustee's grouped the cases because, in our
24 view, there are three groups of cases. The first group --
25 and that's the question Your Honor just had -- the cases

Page 10

1 where fact discovery is open under existing CMOs. The
2 second group, in the Trustee's view, would be the cases that
3 participated in Madoff's deposition. And then the third
4 group of cases are cases where discovery is closed and they
5 did not participate in Madoff's deposition. And I'll take
6 those (indiscernible).

7 Cases with open fact discovery -- I don't think
8 that there would -- I don't expect there to be disagreement,
9 and I think we've gotten that far with the negotiations
10 where Defendants would agree that those would be part of a
11 consolidated proceeding. There are seven of those cases.

12 With respect to the cases that participated in
13 Madoff's deposition, of the objecting parties there are 92
14 of those cases that participated in Madoff's deposition.
15 And given the deposition, in the Trustee's view, it's
16 reasonable at this juncture to seek to take additional
17 discovery on the Ponzi issue to refute the issues injected
18 into the case by Mr. Madoff's deposition.

19 And, Your Honor, just -- if you would indulge me a
20 bit, just to go through how Madoff's deposition --

21 THE COURT: What discovery does the Trustee need?
22 The Trustee's been preparing these cases for ten years or
23 eight years.

24 MS. BELL: Yes, Your Honor, and that is absolutely
25 correct. And I think as we addressed at the last hearing,

Page 11

1 Mr. Madoff injected certain issues into the case that the
2 Defendants themselves have agreed that these are completely
3 new issues, and we have transcripts where we've talked about
4 that. And so, the Trustee would like the opportunity to put
5 in additional fact witnesses who can testify --

6 THE COURT: But who? What? Who do you --

7 MS. BELL: So, there are certain witnesses that
8 Mr. Madoff himself mentioned at the deposition, so we can
9 start with those individuals like Mr. Dan Bonventre,
10 individuals like Ms. Annette Bongiorno, Ms. Condoleezza
11 Picks. There are a number of individuals who either worked
12 on the convertible arb transactions that are clearly at
13 issue, just based -- coming out of Mr. Madoff's deposition.
14 The Treasury transactions that the Defendants, I think, have
15 now wrapped a lot of their defenses around.

16 THE COURT: But let me ask you this. It's always
17 been the Trustee's theory that the Ponzi scheme began in the
18 '70s, I think.

19 MS. BELL: Yes, Your Honor.

20 THE COURT: Okay. So I assume you would have been
21 able to prove that when -- or develop that case over the
22 last eight years because Madoff allocuted that it began in
23 1992 or something like that, right?

24 MS. BELL: Yes.

25 THE COURT: So, why do you need more discovery?

1 MS. BELL: Yes. He allocuted that the Ponzi began
2 in the 1990s but Mr. Madoff's testimony has changed over
3 time. Your Honor, and to be clear, the Trustee --

4 THE COURT: But he's never deviated from that, I
5 don't think.

6 MS. BELL: Well, I think he's deviated in a number
7 of significant ways. He said that the Ponzi scheme began in
8 '92 and then in his deposition, he walked away from that and
9 said, well, the convertible arb transactions were always
10 real. And so now it's now longer a time limitation; it's
11 become a strategy-based limitation.

12 The convertible arb transactions purportedly
13 occurred through 1998. And so are we at '98 or are we at
14 '92? There is also -- Mr. Madoff in his allocution said
15 that the split strike conversion strategy did not happen;
16 that he promised customers that he would have a basket of
17 securities. He did not. And as part of that promise he
18 also promised that he would invest in treasury, and he
19 didn't do it. And he said that --

20 THE COURT: It's been awhile since I looked at his
21 deposition, but as I recall, he was talking about earlier
22 days in his deposition. And I thought he always said that
23 once he started the split strike conversion strategy -- or
24 he never even addressed what happened after 1992.

25 MS. BELL: I think he said in later depositions

1 that the convertible arb strategy was real, and those
2 transactions went through '98. I think --

3 THE COURT: So, who would you want to depose about
4 that?

5 MS. BELL: With respect to convertible arb, I
6 think there are a number of former BLMIS employees. Ms. Jo
7 Ann Sala, who worked with Mr. David Kugel on the convertible
8 arb transactions. So, Mr. Kugel as well, who also pled.
9 And these are individuals who testified at the criminal
10 trial.

11 What the trustee is seeking to do is to have a
12 limited number of former BLMIS employees who can testify to
13 the issues that admittedly the Defendants have said that
14 these are new issues and these things completely change the
15 case.

16 THE COURT: Do you know what they're going to say?

17 MS. BELL: I'm sorry?

18 THE COURT: Do you know what they're going to say,
19 these witnesses?

20 MS. BELL: Your Honor, we have a good sense of
21 what they're going to say just based on --

22 THE COURT: So, why don't you just call them as
23 witnesses at the trial?

24 MS. BELL: Your Honor, we are preparing to do
25 that. I think, though, that the Trustee -- the record is

Page 14

1 going forward, at least the evidence that's been produced to
2 date, is going forward with full -- four days of Madoff's
3 deposition. And similar to the decision that was made in
4 the PW context, where the Trustee was given the opportunity
5 because Defendants sought Mr. Madoff's deposition to speak
6 with former employees. And Your Honor raised "Well, have
7 you spoken to anyone else?" I think the Trustee should be
8 accorded -- though it might be a limited number of folks --
9 the opportunity to speak to those employees. To go forward
10 on a full record and a full consistent, balanced record so
11 that Mr. Madoff's testimony is not the only fact witness
12 that we have at play on this Ponzi issue that runs across
13 all the cases.

14 And, Your Honor, I think Mr. Madoff's deposition
15 has changed -- has injected a number of new issues, like I
16 said before, into the case. And this proceeding, this fraud
17 proceeding, I think as we've termed it, if you recall, when
18 Mr. Madoff's deposition was requested, it was really around
19 the '92 issue. We started calling it the start date issue.

20 There was an expert report, Mr. Feingold, that
21 some of the Defendants proffered on this '92 issue on
22 convertible arb. That issue has since changed. Those
23 issues have evolved. We're now talking about there was no
24 Ponzi at all, or the treasury transactions were made for the
25 investment advisory business customers. Or everything that

Page 15

1 happened outside of con-arb or split strike, those accounts
2 that we call in our papers the non-con-arb, non-split-strike
3 transactions, those were always real.

4 I think that because those issues are injected
5 into these cases that the Trustee should be given a limited
6 opportunity to rebut what Mr. Madoff has said, because
7 Defendants themselves -- and we have a number of transcripts
8 where we've all agreed that these are new issues that we
9 would -- when we got to the point of Mr. Madoff's deposition
10 being concluded, that we would address those issues there.
11 And the Trustee's simply asking for the opportunity, to be
12 accorded the opportunity to do that.

13 We're not looking for a discovery period that will
14 go for years and years. I think, though, that --

15 THE COURT: Well, it does go for a year.

16 MS. BELL: It does, Your Honor. But I think under
17 any other formulation it will go for at least -- longer than
18 that because we'll be proceeding on separate tracks. You
19 have cases where discovery is still open. The Trustee will
20 have that evidence in those cases on the same Ponzi scheme
21 perpetuated by the same person at the same company. And so
22 to proceed on different factual record I think raises a
23 significant issue for the parties and certainly for the
24 Trustee.

25 And our attempt to come up with an omnibus

Page 16

1 proceeding that would be fair, I think the Court can see the
2 significant substantial differences between the original
3 order and the revised order. And we didn't put in a red
4 line because there was no point in doing that because the
5 order has changed so significantly. Simply to deal with the
6 Ponzi issue in Mr. Madoff's deposition and the Trustee's
7 ability to -- and just based on the course of dealing, I
8 think, and the hearings before this Court, it was always
9 anticipated that the Trustee would have an opportunity to
10 rebut the testimony.

11 And if we review the day one order on Paragraph L
12 -- Paragraph L was very clear in that order that as to the
13 participating customers, they would not have the opportunity
14 to continue deposition because Your Honor recognized that
15 they requested this deposition years after these cases had
16 been proceeding. And so the Trustee expressly in hearings
17 carved out his right to be able to go after additional
18 discovery to rebut Mr. Madoff's deposition testimony.

19 I think that also came through in the day two
20 order. And in that order, that order expressly incorporates
21 what happened at the hearing on June 29. And at that
22 hearing, again, there was a colloquy about the Trustee's
23 ability to be able to take additional discovery.

24 THE COURT: One of the problems I have is your
25 order is sort of open-ended. Both Madoff orders, deposition

Page 17

1 orders said that you had the right to seek further discovery
2 based upon Madoff's testimony. You've now told me well,
3 there's the issue of whether or not the convertible
4 arbitrage transactions were legitimate transactions; there's
5 the issue of whether -- when the business was purchasing
6 treasuries, they were or should have been allocated to the
7 particular customer accounts. Those are two issues. What
8 other issues do you want to take discovery on? I'm trying
9 to understand and confine what it is you're looking into.

10 MS. BELL: Well, so I think, Your Honor, there's
11 the issue of Madoff's deposition, but what's derivative of
12 that, what defense is --

13 THE COURT: Madoff's deposition is done, as I
14 understand it.

15 MS. BELL: Your Honor, I think that's something
16 that we will decide today. I know in the Trustee's view,
17 we're prepared -- we're fine with Mr. Madoff's deposition
18 being concluded. I know --

19 THE COURT: Well, did everybody have the right to
20 cross-examine?

21 MS. BELL: Well, at the end of the last deposition
22 I know Ms. Chaitman reserved her right to take additional
23 time. In the Trustee's view, the deposition has concluded.

24 THE COURT: How many days was Madoff deposed?

25 MS. BELL: He was deposed, I believe, on day one

Page 18

1 he was deposed for three days. And day two he was deposed
2 for two days.

3 THE COURT: Okay.

4 MS. BELL: But, Your Honor, the arguments have
5 advanced beyond the convertible arb and beyond the start
6 date of the Ponzi scheme. So --

7 THE COURT: But that's what I'm -- that's what I'm
8 trying to find out, because all your order says is we've got
9 four months of fact discovery and it's not supposed to be a
10 complete do-over.

11 MS. BELL: Right, and I agree with that, Your
12 Honor. So, what the Trustee was attempting to do in this
13 order was, in our meet and confer, the Defendants raised the
14 issue of the 27 subpoenas that Ms. Chaitman served. If you
15 recall in the original order, the Trustee had a limited
16 number of discovery. We tried to do it based on numbers so
17 the Court would see from the Trustee's perspective we're not
18 trying to have this go for many, many months and to be an
19 open-ended process.

20 In this order we did not do that simply to
21 accommodate the request to have those 27 trader subpoenas.
22 And I think that's worth talking about as well, because not
23 only do we have Madoff's deposition that the Defendants have
24 requested but there are 27 trader subpoenas of former BLMIS
25 employees who worked on the House 5 side. I think there was

1 one who was on the House 17 side, but we want the
2 opportunity to talk to the House 17 employees. There is a
3 criminal trial. In 2014, five employees were found guilty.
4 There are a number of plea allocutions where we would like
5 the opportunity to have -- and we recognize that that's
6 admissible evidence, but to explore those and to unpack
7 those to address the issues that are at play in this case.

8 And so Defendants have not only stated the start
9 date issue and the convertible arb issue, but there's an
10 issue about how subscription -- how redemption requests were
11 paid. There was no Ponzi scheme at all. The issues have
12 ballooned and mushroomed from beyond where we started. And
13 so if the Trustee was preparing a case -- and we certainly
14 believe, again, that we have enough admissible evidence to
15 prove our case, but as a matter of fairness and equitable
16 principles, this case should go forward on a full and
17 balanced record.

18 THE COURT: But a lot of the Defendants say we
19 don't -- you know, discovery's cut off.

20 MS. BELL: But --

21 THE COURT: You should be able to prove your case.
22 If they don't want discovery, why do you want to keep
23 discovery open?

24 MS. BELL: Because, Your Honor, we kept it open on
25 the Ponzi issue, I think, from -- that was always

1 contemplated in connection with Mr. Madoff's deposition.

2 The other fact I would say is, again, if discovery
3 happens in some of the cases and not in the other cases,
4 this becomes an incomplete record for some cases and on the
5 same Ponzi scheme. So I think there is an issue there that
6 the Court would need to address.

7 And if we go forward, and the Trustee is prepared
8 to go forward on these cases one at a time -- but we've
9 tried that before in the Cohen case, if the Court will
10 recall, and there was a motion to intervene. And so, again,
11 we're not trying to get --

12 THE COURT: That was unsuccessful and affirmed on
13 appeal so --

14 MS. BELL: Correct, correct. We're not trying to
15 get an advantage here. It's the Trustee's -- we're not
16 trying to do a one-upmanship here. I think the idea is to
17 proceed in a way that is rational, that is judicially
18 efficient. It's an opportunity for the Court and for the
19 parties to streamline this process, because otherwise, we
20 continue with these discovery disputes for certain types of
21 records. There -- we've integrated and built into the
22 process where we would have Judge Moss overseeing some of --
23 to the extent that discovery disputes come up, to take that
24 off the Court's calendar, and because Judge Moss is familiar
25 with these issues that have come up before.

1 THE COURT: Well, the Defendants would have to
2 consent to that but --

3 MS. BELL: Yes, Your Honor, I agree with that.

4 THE COURT: All right. All right. Let me hear
5 from the Defendants.

6 MS. CHAITMAN: Good morning, Your Honor. Helen
7 Davis Chaitman on behalf of a number of Defendants. Your
8 Honor, when I answered the complaints on behalf of all of my
9 clients, I asserted that we did not believe that there was a
10 Ponzi scheme and that we believed that Madoff purchased the
11 securities.

12 So these issues have been in this case from day
13 one. And the reason that I have embarked on this now two-
14 year effort to obtain the trading records is because I
15 believe I can prove -- I've already gotten some records
16 which I've been able to prove that the securities were
17 actually purchased for some of my customers.

18 Now, there's -- the Court has been so strict in
19 enforcing the case management orders and the deadlines in
20 the case management orders, and most of that has worked
21 against the Defendants. Because we've come in and asked for
22 additional time and Your Honor has been very strict about
23 it, which, of course, is -- I'm not challenging your right
24 to do that. Of course you have the right to do that. But
25 that should be applied to the Trustee as well.

1 These issues have been in the case from day one,
2 and the Trustee -- I mean, for the Trustee to say that they
3 didn't know we were going to take the position that actual
4 securities were purchased is absurd. I believe it was in
5 2011 that I filed evidence of Madoff having purchased T-
6 bills. And the Trustee filed papers saying I didn't know
7 what I was talking about; this was a phony document. And
8 then Mr. Madoff said, yes, the 17th floor customers did, in
9 fact, have T-bills and he used their money to purchase a
10 portfolio of \$6 billion of T-bills, and you've heard about
11 that in the past. So these are not new issues and there's
12 no reason to take this discovery now.

13 THE COURT: So, why do you want to take the
14 discovery of the traders with your subpoenas?

15 MS. CHAITMAN: Because I served those subpoenas
16 about 18 months ago and Your Honor took the position that I
17 couldn't take those depositions.

18 THE COURT: Well, we said we would wait -- there's
19 an order that says we'll wait until the end of the Madoff
20 deposition.

21 MS. CHAITMAN: Right, okay. So what's happened
22 with the Madoff deposition is that, as you are painfully
23 aware, I've been trying to get the Trustee to produce the
24 trading records. We've been going round and round on this.
25 But on June 5th we all met with counsel for the Trustee and

1 Mr. Sheehan told us that he would give us access to the
2 BLMIS database, which has, you know -- I forgot the number -
3 - 30 million pages of documents, whatever it is. That would
4 include all the trading records.

5 In the meantime, I was before you on May 1st, when
6 I was asking for permission to file a motion for sanctions
7 against the Trustee for concealing material evidence, and
8 you said, go back to Magistrate Judge Moss.

9 THE COURT: That's not what I said. You said I
10 told you -- in the most recent submission you said I told
11 you you couldn't make the motion.

12 MS. CHAITMAN: Right.

13 THE COURT: And what I said was I won't stop you
14 from making the motion, but it sounds to me like Judge Moss
15 has dealt with these issues, he's established a procedure,
16 and that procedure should be followed. And you said, okay,
17 I'll go back to Judge Moss.

18 MS. CHAITMAN: Okay.

19 THE COURT: Did you go back?

20 MS. CHAITMAN: Here's what happened. That very
21 afternoon, May 1st --

22 THE COURT: I take it from your response, you
23 didn't.

24 MS. CHAITMAN: Let me tell you why. May 1st, the
25 day we were before you, Mr. Shifrin emailed me and said we

Page 24

1 will voluntarily producing the trading records.

2 THE COURT: You were before me that day, May 1st.

3 MS. CHAITMAN: I'm sorry?

4 THE COURT: The transcript is May 2nd but you were
5 before me May 1st.

6 MS. CHAITMAN: Okay. On May 1st, the day that we
7 were here, I got an email from Mr. Shiffrin which I put into
8 evidence. I sent it -- I filed it on Monday. Where Mr.
9 Shiffrin emailed me and said, we will produce the trading
10 records. We then had communications where he produced
11 trading records he'd previously produced --

12 THE COURT: Can I save some time and cut you off
13 on this? I've been hearing about this now for over two
14 years. There is a procedure in place. You can either go
15 back to Judge Moss, I suppose, where I said, go make a
16 Motion to Compel, if you want to make a motion. But this
17 has been a he said-she said for two years and they're going
18 to tell me that they did produce whatever it was you had
19 asked for.

20 So, with respect to these trading records, just
21 make a motion or go back to Judge Moss with the procedural -

22 -

23 MS. CHAITMAN: Then I'll make a motion.

24 THE COURT: Fine.

25 MS. CHAITMAN: I'll make a motion. But let me go

Page 25

1 over a few of the issues. You know, there --

2 THE COURT: Let's get back to the procedure.

3 MS. CHAITMAN: Okay. There are two separate
4 issues here, though. One is the discovery, which you have
5 always expressly on the record reserved, which was the open
6 discovery. I was able -- you said I could take the
7 depositions and get the documents from the subpoenaed --

8 THE COURT: Well, I said you could serve the
9 subpoenas and then we would talk about that and I think
10 expert discovery after the end of Madoff's deposition.

11 MS. CHAITMAN: There was the issue of my document
12 demand, which has never been satisfied, and there was the
13 issue of the discovery of the traders, and there was the
14 completion of Madoff's deposition, which I've left open
15 solely because the Trustee has not produced the trading
16 records.

17 If Mr. Sheehan fulfills his promise to us on June
18 5th that he will give us all access to the BLMIS database,
19 that would solve the trading records issue. He hasn't told
20 me he's reneging on that --

21 THE COURT: These are the 4,000 microfilms?

22 MS. CHAITMAN: No, no, no. This has nothing --

23 MS. BELL: No, Your Honor, these are 30 million
24 documents.

25 MS. CHAITMAN: 30 million --

1 MS. BELL: For the BLMIS database.

2 THE COURT: And what's involved in making them
3 available mechanically?

4 MS. BELL: Your Honor, I think we have to proceed
5 pursuant to Rule 26 of the Federal Rules of Civil Procedure,
6 and there are some technical issues.

7 THE COURT: What's involved in producing those?

8 MS. BELL: So, here's what I'd say, Your Honor.
9 We had -- in the first meet and confer that we had, where we
10 thought we were making progress, one of the things, because
11 we had I thought, tentatively at least -- I conceptually
12 agreed to a consolidated discovery proceeding.

13 In the context of that discussion, the BLMIS
14 database came up and Mr. Sheehan did represent that the
15 Trustee is certainly open to producing that database. There
16 are some logistical issues that we will need to talk about
17 with Defendants. There are cost concerns, there are
18 concerns. And so we had set aside another meeting --

19 THE COURT: Well, that's what I want to know. I
20 want to know who's going to bear the cost of this.

21 MS. BELL: And that's what -- we had a meet and
22 confer that was set up as of the date of the last hearing
23 that -- that meet and confer did not happen because we had
24 to come here. We set up another meet and confer and we did
25 not continue that discussion because at that time,

1 Defendants told us that they were not agreeing to a
2 consolidated discovery proceeding.

3 THE COURT: Okay. Let's get back to the issues
4 and the order -- this consolidated discovery issue.

5 MS. CHAITMAN: The -- you mean --

6 THE COURT: I understand you have disputes about
7 whether documents have been promised or produced, but let's
8 get back to the order. The concept of consolidate --
9 additional.

10 MS. CHAITMAN: Okay.

11 THE COURT: Reopen -- whatever consolidated
12 discovery along the lines the Trustee is proposing.

13 MS. CHAITMAN: Okay. The vast -- as the Trustee
14 says, the Trustee has not given us the names of the seven
15 cases that discovery is still open in, but in the vast
16 majority of my cases, fact discovery has long since closed
17 except for the deficiencies in the Trustee's production, and
18 the deposition of Mr. Madoff, and the subpoenaed witnesses.
19 So, there is no ability to take back discovery.

20 Under the federal rules, the only way that the
21 case management order could be so retroactively changed is
22 if the Trustee could prove that he proceeded with all due
23 diligence, which he can't possibly do, in view of the fact,
24 as I've explained, that I asserted these issues from day one
25 in answering the complaints, and the Trustee -- there's

1 nothing that Mr. Madoff said that couldn't have been
2 anticipated. These are all the --

3 THE COURT: So you're telling me that based upon
4 what Madoff said, there's no need for additional discovery?

5 MS. CHAITMAN: I'm entitled to --

6 THE COURT: Because the order says -- I'm not --
7 the order says, or both orders say that I'm not reopening
8 discovery but I'll consider the issue based upon what comes
9 out of Madoff's deposition. And you're telling me that
10 whatever came out of the Madoff deposition has been in the
11 case for eight or ten years or however --

12 MS. CHAITMAN: Exactly, exactly.

13 THE COURT: All right.

14 MS. CHAITMAN: And it will be proven by the
15 trading records, if I ever get them.

16 THE COURT: Okay.

17 MS. CHAITMAN: We would like to have the
18 opportunity, Your Honor, if the Court is going to enter an
19 order, of submitting a proposed counter-order. There are a
20 number of issues that are raised by the --

21 THE COURT: Let me raise an issue with you, and
22 it's really for everybody. At the end of the day, some sort
23 of consolidated proceeding is contemplated for those cases
24 that are eligible for that. And by that I mean, cases where
25 I can make findings of fact and conclusions of law or I can

1 at least make proposed findings of fact and conclusions of
2 law. I understand the jury trial issue; let's put that
3 aside.

4 Here's my concern. Discovery is still open in
5 seven cases, right? The Trustee wants to take Ms.
6 Bongiorno's deposition in those seven cases, and she
7 testifies, "Oh, yeah, we never bought a single security. It
8 was all a fraud." I then have a consolidated proceeding.
9 Can the parties who were not entitled to further discovery
10 argue you can't use Ms. Bongiorno's deposition against me
11 because I didn't have the opportunity to cross-examine?
12 That's the practical problem I want to deal with.

13 And maybe the answer is, as the Trustee suggests,
14 well, you can opt in to additional discovery or not but your
15 order doesn't say it, but you're deemed to have the
16 opportunity to cross-examine all witnesses that you choose
17 not to attend.

18 MS. CHAITMAN: Your Honor, with respect to Ms.
19 Bongiorno's deposition, she's --

20 THE COURT: Let's get back to the practical
21 problem that I just raised. It could be Ms. Bongiorno's
22 deposition, it could be anybody. It could be one of your
23 traders.

24 MS. CHAITMAN: Okay.

25 THE COURT: Suppose one of your traders says, "We

1 never -- we never allocated any purchases from House 5 to
2 House 7 clients." So, how do I deal with that in a
3 consolidated proceeding where some people have not been
4 allowed to participate in discovery because discovery was
5 closed? That's my practical question to all this.

6 MS. CHAITMAN: Okay. That means that we'd have to
7 -- you know, these cases from day one have proceeded
8 separately.

9 THE COURT: I understand.

10 MS. CHAITMAN: And so based on who was the
11 attorney representing the Defendants and other issues,
12 different discovery was taken. You've got that issue.
13 We've got ten years of that history.

14 THE COURT: So are you saying that you really
15 can't have a consolidated proceeding? Is that what the
16 answer to all this is?

17 MS. CHAITMAN: I think that it's impossible. My
18 own view is it's impossible. If the cases had been
19 consolidated from day one, that was a choice the Trustee
20 could have made --

21 THE COURT: Well, with the depositions -- I'm not
22 so worried about documents but with depositions taken in
23 these separate cases as they were proceeding along just with
24 those particular Defendants?

25 MS. CHAITMAN: Yes. And particularly with Ms.

Page 31

1 Bongiorno. I took her deposition in prison with respect to
2 the profit withdrawal issue --

3 THE COURT: Well, that was a consolidated
4 proceeding.

5 MS. CHAITMAN: But the point is you ruled that
6 that deposition cannot be used in the claw-back cases. So -
7 -

8 THE COURT: Well, I thought you said something
9 differently -- different. Let me just finish. I thought
10 you said in any particular case -- and let's take Sarin
11 Lawrence as an example.

12 MS. CHAITMAN: Okay.

13 THE COURT: You took a deposition of somebody just
14 in that case. Then what you're saying is the same problem
15 about trying to use that deposition depending on what they
16 said in the consolidating proceeding is the same problem
17 I've just raised. So the problem's already there, is what
18 you're saying?

19 MS. CHAITMAN: The problem is there. Although in
20 my cases, I've stated a number of times that if I take a
21 deposition in Sarin Lawrence' case, it's applying to all of
22 my clients. And there's never been any objection.

23 THE COURT: Okay. But there are other lawyers
24 here who will be participate.

25 MS. CHAITMAN: Exactly. Exactly.

1 MR. KRATENSTEIN: If I may, Your Honor. Andrew
2 Kratenstein for the Sage Defendants. I just wanted to echo
3 something. I want to pick up on that Bongiorno deposition
4 point. By the way --

5 THE COURT: I used her as an example.

6 MR. KRATENSTEIN: She is. Well, the reason it's a
7 good example, actually -- because you're absolutely right,
8 by the way. What you've come to I agree with completely.
9 The problem with the concept of a consolidated proceeding
10 among others is that the cases proceeded on these different
11 tracks, but why? Why did they proceed -- why are we here,
12 right?

13 I mean, I, for example, was the person who
14 actually asked -- it was me who asked to use Bongiorno in my
15 case, and you said no. Fine. I asked that and in a letter
16 in November 2016, almost two years ago, the Trustee said in
17 that letter to this Court, you know, we think we might want
18 to have an omnibus proceeding like this one later where we
19 depose Ms. Bongiorno with everybody. And they didn't make
20 that motion until now.

21 I mean, they've been thinking about -- musing
22 about doing this for a very long time. They waited until we
23 were all done to say, "All right, now that I've seen
24 everything you guys have put in, I'd now like to do some new
25 things."

1 THE COURT: That's a variation of Ms. Chaitman's
2 arguments that these issues have been on the table for all
3 these years.

4 MR. KRATENSTEIN: Absolutely. And the only
5 addition I'd make on that is when you asked the question of
6 having all these cases going on different tracks, the
7 Trustee, who is in each case -- we're not in each case --
8 had the power very early to realize this issue. Had the
9 power and, in fact, did realize the issue. They said it to
10 the Court about two years ago. "You know, we probably are
11 going to need an omnibus proceeding here. We probably ought
12 to do that. I don't want, you know, the Sage Defendants to
13 use Bongiorno's deposition here. We're going to depose her
14 again," etc.

15 That was the time, Your Honor, to make the motion
16 that they just recently made. They didn't do it and now
17 they want, to you use your words, a do-over and they
18 shouldn't be allowed to do that.

19 MS. BELL: Your Honor, if I may --

20 THE COURT: How do you resolve a practical issue
21 like -- well, I know what you'll tell me. To reopen a
22 consolidated discovery proceeding.

23 MS. BELL: But, Your Honor, the Trustee doesn't
24 see it as a reopening of the proceeding; it's a continuation
25 of the proceeding. But I just want to address a few things

1 that were just said.

2 THE COURT: Okay, but let me just stop you. There
3 are a lot of cases where discovery ended, they couldn't
4 participate in the Madoff deposition, but they're part of
5 the same issue, right?

6 MS. BELL: But Mr. Kratenstein -- Mr. Kratenstein,
7 Your Honor, had an objection to the Trustee's original
8 motion. And I quote from the objection, Paragraph 6, "The
9 Sages have no objection to coordinating the remaining good
10 faith actions for discovery purposes." So this is a complete
11 scene change and an about face.

12 But as equally as important, Your Honor, under the
13 Court's Madoff order, day one and day two, and with all the
14 hearings that occurred, the Trustee could not seek such a --
15 we made it clear that we were contemplating this request.
16 There was a procedure for doing that. And so --

17 THE COURT: I don't doubt that you were
18 contemplating the request or you can't make the request, but
19 the order said if you learn something from Madoff's
20 deposition that triggered the need for more discovery, that
21 you could ask for it basically. Or maybe you'll get it.

22 But what the Defendants are saying is nothing came
23 out of Madoff's deposition that wasn't in the case before.

24 MS. BELL: But, Your Honor, and I can quote from
25 the transcripts where the Defendants had said, this is

1 completely new, this changes the case.

2 THE COURT: I remember that one. It's true.

3 MS. BELL: And we also have more than one
4 Defendant's counsel who's said that. Mr. Kajon has also
5 said that, who represents the Legacy Defendants. Because
6 this is new. Yes, the Trustee has always anticipated --

7 THE COURT: It's new evidence of something --
8 contrary to what you were saying, I think that's what it
9 meant.

10 MS. BELL: But it's also very -- so, the issue of
11 treasuries being part of the transactions that the
12 Defendants were claiming either defeated the Ponzi scheme or
13 rendered their transfers not subject to the Ponzi
14 presumption, that is a new issue. That issue was not at
15 play. And as Ms. Chaitman said, she raised the issue in
16 2011, and every expert report that we've served on each of
17 these Defendants we have identified in one of the exhibits
18 that treasuries had been purchased at Madoff Securities.

19 Those treasuries were not for the investment
20 advisory customers. The yields from those treasuries in any
21 given year was far less than one percent of any of the
22 redemptions that went out.

23 And so it's not the Trustee's view that the issue
24 of treasuries, we didn't know that treasuries existed; we
25 were always -- we always -- we were open about the

1 treasuries that were purchased by Mr. Madoff. Those
2 treasuries were not purchased for the investment advisory
3 customers. The Trustee --

4 THE COURT: So, okay, but you're saying this issue
5 was always there and, you know, maybe they could've taken
6 discovery in it whenever it was.

7 MS. BELL: But they've gotten fact deposition --
8 they've gotten deposition of fact witnesses on that issue.
9 There are documents -- the Trustee is in possession of
10 millions, and millions, and millions of documents, as we've
11 discussed in this court before. The Trustee's discovery
12 obligation is not simply to produce those documents on some
13 perhaps theory that the Defendants might come up with to
14 challenge the Ponzi scheme.

15 And so we are limited by what the issues are in
16 the case; the claims and defenses in the case. That was
17 never a defense in the case, as acknowledge in the hearing
18 by these very same counsel.

19 THE COURT: You know what's remarkable about this?
20 You sound like you're the Defendants arguing for more
21 discovery, and the Defendants sound like you're the
22 Plaintiffs wanting to cut off discovery, which is
23 remarkable.

24 MS. BELL: This case is very curious, Your Honor.

25 MS. CHAITMAN: Judge, I just want to say one

1 thing. I was the one who made the statement about the
2 evidence being explosive. The evidence confirmed the
3 position I asserted in every answer.

4 THE COURT: No, I know what you meant.

5 MS. CHAITMAN: And it's -- you know, this, if I
6 can use the phrase doubletalk about the treasuries -- they
7 were purchased with money from the investment advisory
8 customers. It was money from the 703 account. We can trace
9 that. So, to say it wasn't purchased for the customers when
10 --

11 THE COURT: Well, that's the only money he had,
12 right? The money he got from the customers?

13 MS. CHAITMAN: Not at all. He had 188 employees
14 working for every major investment firm in the country. It
15 was all one entity. And as he explained in his deposition,
16 the back of every trade confirmation he sent to the
17 investment advisory customers said that he dealt as
18 principal, which he explained meant that he never went into
19 the market for the investment advisory customers. They only
20 bought and sold from Madoff.

21 So it was all one entity. You can't separate out
22 what the traders did from --

23 THE COURT: We're getting a little far afield --

24 MS. CHAITMAN: Okay.

25 THE COURT: -- which is how do you try this as a -

1 - how do you try it as a consolidated proceeding where
2 discovery has already been taken, I guess, in some cases?

3 MS. BELL: They have not on the Ponzi issue, Your
4 Honor, for BLMIS employees.

5 THE COURT: Well, whatever the issue was. Some of
6 them are trial ready --

7 MS. BELL: Well, just as Defendants. We've not
8 taken discovery on any of these issues with the exception of
9 Madoff's deposition in PW, which was different, and that was
10 on a consolidated proceeding. Essentially, what we're
11 proposing here is the very thing.

12 And, Your Honor, I neglected to mention I accept
13 your proposed change of having the deposition that
14 Defendants deemed to have participated in the deposition,
15 and we'll submit a proposed order that includes that
16 provision. Because I think that gets to the crux of what it
17 is that we're trying to do here, proceeding on -- and in our
18 review, these cases are not closed on the Ponzi issue.

19 And so we're not seeking to reopen; we're seeking
20 to continue what was started on the Madoff deposition and by
21 the Madoff deposition. So, we could say that these
22 depositions and the documents that are at issue are part of
23 the very fraud proceeding that this Court has talked about
24 in arguments, and we've raised in the Roman -- Your Honor
25 raised in the Roman decision.

1 THE COURT: Let me hear from some of the other
2 parties.

3 MS. CHAITMAN: I just want to say one thing,
4 Judge. If I came in and I said, "You know, Judge,
5 discovery's over in my cases but I now think that I really
6 should be able to take certain discovery..." I wouldn't get
7 two feet in this court. And that's what the Trustee's
8 trying to do.

9 Again, if you look at every one of my answers,
10 you'll see I disputed that there was a Ponzi scheme. This
11 has been in the case since I filed the answers. Thank you.

12 THE COURT: Ms. Neville?

13 MS. NEVILLE: Good morning. Carole Neville from
14 Dentons. Your Honor, I have 14 clients on this -- in this
15 matter now, and the case management order, and all but one
16 of them said that discovery closed. And I'm finding it kind
17 of staggering that Ms. Davis now says that after ten years
18 and a billion dollars, the Trustee has not taken discovery
19 on the Ponzi issue.

20 We have expert reports in all of our cases. What
21 was happening then? What were they doing? Right now, what
22 I hear, if I'm --

23 THE COURT: What was the date of the Dubinsky
24 Report? Because that was -- 2013?

25 MR. KRATENSTEIN: It was 2013.

1 THE COURT: 2013. So, certainly the issue was up
2 there then.

3 MS. NEVILLE: So, I'm hearing now that of 153 --
4 because it's not 106 cases or 105; it's 153 -- there are
5 seven cases where discovery is open and they want to have a
6 consolidated order that cuts off discovery from everybody
7 else? They were obliged to make a motion to show why they
8 were entitled to discovery.

9 What that order from, I think it was September
10 2017, says is that discovery is closed except for the right
11 for the right for the Picower parties, of all people, the
12 Defendants, and the Trustee and SIPC to take discovery on
13 the Madoff. And the Court reserved the issues from the June
14 29th transcript, which I have with me and I read carefully
15 yesterday. There were two issues that were reserved, and
16 they both were the issues Ms. Chaitman raised. There was
17 the production of trading records and the deposition of
18 traders.

19 So, the discovery obligation is from the Trustee
20 to us. Why they now want to open up 12 depositions of
21 Madoff employees to prove the case -- because I think they
22 realize they haven't proved it after all of these years and
23 after all of this money.

24 Rule 16 sets out a standard and I don't think
25 they've met it. They've been not diligent in pursuing their

1 discovery. It's been a really long time. And it is
2 prejudicial to us. Because what they intend to do is reopen
3 all the things that we have now -- I've filed voluminous
4 mediation statements, I've got my case all lined up, and now
5 they want to reopen discovery. Or if you opt out, they
6 don't have to give us what they've been committing to give
7 us for five years.

8 So, I just -- I really -- I'm kind of outraged at
9 Ms. Davis' position here, that she's reserved --

10 THE COURT: It's Ms. Bell. I knew who she meant.

11 MS. BELL: I did too, Your Honor.

12 MS. NEVILLE: I'm sorry. I called you Tracy the
13 other day, too.

14 MS. BELL: You did. I should be used to it.

15 MS. NEVILLE: I have a thing about your name. I
16 just think that at this point, they haven't made the case
17 for opening discovery --

18 THE COURT: So, you say you have 13 cases? 13
19 cases where discovery is closed?

20 MS. NEVILLE: Right.

21 THE COURT: Are you ready to try those cases?

22 MS. NEVILLE: We're in mediation in a good number
23 of them.

24 THE COURT: I assume they all raise the same
25 issue, right?

1 MS. NEVILLE: No, they're not. There are
2 subsequent transferees, there's all kinds of issues.

3 THE COURT: But the underlying issue of this Ponzi
4 scheme issue. It's the same issue --

5 MS. NEVILLE: Yes, that issue is, but there are
6 lots of other issues and you've heard some of them when we
7 did the Markin case.

8 THE COURT: I understand. Before I hear from you,
9 Ms. Bell, let me hear from the other Defendants, to the
10 extent they want to be heard.

11 MR. KAJON: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. KAJON: Nicholas Kajon from Stevens & Lee, on
14 behalf of Defendant Legacy Capital. I'm not going to
15 reiterate arguments that have already been made. I just
16 want to focus on a few distinct issues that pertain to my
17 client and maybe just a couple of other -- or some other
18 Defendants.

19 First, we did not file a Proof of Claim. Second,
20 we did not participate in the Madoff deposition, so to the
21 extent that opens the door, and I'm not conceding it does,
22 but to the extent it does, it doesn't apply to us. Third,
23 fact discovery ended in our case more than a year ago.
24 Fourth, expert discovery ended in our case about a year ago,
25 but for my right to take the deposition of the Trustee's

1 expert, Bruce Dubinsky, based on his August 2013 report.

2 THE COURT: Well, I think everybody wants to do
3 that. I know, Ms. Chaitman, you reserved that right also?

4 MS. CHAITMAN: Yes, I did.

5 THE COURT: Was that for -- well, in some cases,
6 discovery was closed in your cases. Did you reserve that
7 right, or was that right reserved for all of your cases,
8 even when discovery is closed?

9 MS. CHAITMAN: You entered an order which said
10 that we -- I was concerned about the expert reports because
11 we hadn't gotten the document productions, and you entered
12 an order which said that we would set the date for expert
13 disclosures after we completed the --

14 THE COURT: Yeah, but, you know, I read that order
15 and it talked about operative cases and --

16 MS. CHAITMAN: I think those were the ones that
17 had participated in the Madoff --

18 THE COURT: So, the ones that were still open at
19 that --

20 MS. CHAITMAN: Yeah.

21 THE COURT: As of July 2016?

22 MS. CHAITMAN: Exactly.

23 THE COURT: Okay.

24 MR. KAJON: So, we're very concerned, Your Honor,
25 that, you know, we're differently -- a lot of the Defendants

1 are differently situated. You know, we're all differently
2 situated from each other to at least some extent. We're at
3 different stages of discovery, etc. Some it's open, some
4 it's closed; some it's half open, half closed. And the
5 Trustee is trying to lump us all in the same boat, and we
6 don't think that's fair.

7 So what I did is I proposed language to the
8 Trustee to preserve our separate rights, our separate
9 status. I suggested that the Trustee include in the order
10 that neither the Trustee nor Legacy may take any further
11 discovery in that omnibus procedure but for the right of
12 Legacy to depose the Trustee's expert, Bruce Dubinsky, based
13 on his expert report dated August 20, 2013. And neither the
14 Trustee nor Legacy may use any discovery produced during the
15 omnibus discovery proceeding for any purpose in the Legacy
16 adversary proceeding, including without limitation to
17 supplement any expert reports produced in the Legacy
18 adversary proceeding.

19 That language would preserve our rights. It would
20 let this procedure go forward for those Defendants who
21 wanted to participate in it, but leave us where we were,
22 preserve our rights. The Trustee rejected that language.
23 The Trustee did not include anything in the order to
24 preserve our separate status. And for that reason alone the
25 motion should be denied, at least as to Legacy.

1 Now, if the Trustee wants to make a motion under
2 Rule 16 to reopen discovery, they have that right. I'm not
3 taking that right away from them. But they haven't made
4 that motion. This motion is not a 16B4 motion saying, I
5 want to reopen discovery for cause, here's my cause.
6 There's nothing in that motion that demonstrates cause to
7 reopen discovery for Legacy or any other Defendant for whom
8 discovery is closed.

9 So, I think, you know, this -- they're putting the
10 cart before the horse. I think this motion should be
11 denied. It could be denied without prejudice. They could
12 make their Rule 16 motion. If it's granted and Your Honor
13 reopens discovery for everyone for whom it's already closed,
14 then we can discuss again whether this procedure makes
15 sense.

16 But right now, this procedure makes no sense where
17 each case has its own separate record. You know, there's
18 certain discovery that was taken in my case that clearly
19 wasn't taken in other people's cases. Everyone's in that
20 same boat, so to speak, of having a completely different
21 record.

22 THE COURT: Can I ask you a question? And I don't
23 have it before me. How did the case management order deal
24 with expert discovery? Was there a separate deadline that's
25 run?

1 MR. KAJON: Our deadline ran. But before it ran,
2 in our case, the Trustee agreed we could depose Dubinsky.
3 And I asked them a year ago for mutually -- you know, give
4 me some dates.

5 THE COURT: Well, Dubinsky -- to the extent
6 Dubinsky's going to be deposed, he'll be deposed once and
7 whoever is -- you know, if it's limited to people whose
8 discovery is still open, it'll be one proceeding. He's not
9 going to come back 50 times.

10 MR. KAJON: We have no problem coordinating with
11 the other Defendants on one deposition of Dubinsky.

12 THE COURT: Aside from Dubinsky, are there any
13 other experts that have -- any other Trustee experts that
14 have to be deposed?

15 MR. RICH: Yes, Your Honor. Robert Rich on behalf
16 of Edward H. (indiscernible) and other individual
17 Defendants. We notice that petition (indiscernible)
18 Greenblatt.

19 THE COURT: On what issue?

20 MR. RICH: He submitted two expert reports in our
21 case.

22 MS. BELL: It's on the principle balance
23 calculation, Your Honor.

24 THE COURT: Yeah, but that's -- you know, that
25 assumes that -- he just did a cash-in, cash-out analysis; he

1 wouldn't know whether there was legitimate trading or not
2 legitimate trading.

3 MR. RICH: I'm sorry. I thought you were asking
4 what deposition --

5 THE COURT: Why would you want to take it -- what
6 I'm asking you is why would you want to take his deposition?
7 You went through the records. He figured out what cash went
8 in, what cash went out. I understand there are disputes as
9 to whether certain transactions actually reflected cash.
10 But that's all -- you know, that's what he did. Why would
11 you need his deposition?

12 MR. RICH: We had questions of expert reports.

13 THE COURT: About what, though, that's relevant to
14 this? If the Trustee's right, that all the transactions
15 were fictitious, the Second Circuit has already said it's
16 dollars in and dollars out. If the Trustee is right that
17 all the transactions are fictitious, then you have his
18 principal balance calculation of cash-in, cash-out. But he
19 has -- I don't think anything to testify to about the
20 correctness of the Trustee's position.

21 MR. RICH: I think if you're talking about this
22 one issue -- or in our case, they submitted two expert
23 reports, one talking about transactions in our specific
24 case. And we have a lot of inter-account transactions and
25 how he calculated is --

1 THE COURT: All right. Okay, all right. So
2 there's Greenblatt -- but that's on an individual case by
3 case basis. All right. So other than Greenblatt and
4 Dubinsky, are there any experts on the Trustee's side that
5 people want to depose? Hearing no response, I'll assume...

6 MR. KRATENSTEIN: Your Honor, may we have a
7 moment, please?

8 THE COURT: Yeah.

9 MR. KRATENSTEIN: There is at least one other
10 expert, Your Honor. I believe it's Ms. Galura. I think
11 we're not yet of a view to whether we want to depose her or
12 not.

13 THE COURT: I don't know if she did a case by case
14 analysis. I know a supplemental reported listed PW
15 transactions. But hers was more of a generic type of --

16 MS. NEVILLE: She did submit -- she submitted
17 reports of individual cases.

18 THE COURT: Yeah, okay. So that's -- I'm not sure
19 what she would say but those are three. Anybody else?

20 MR. KRATENSTEIN: Well, the Trustee has said --
21 and maybe Ms. Bell will address this -- that given the
22 development of the record that they intend to supplement
23 reports, put in new experts, etc. So I don't know what
24 their plan is on that.

25 THE COURT: Well, but if discovery is closed in

1 your case, then it's closed. It wouldn't affect your case,
2 right, unless there's some sort of consolidated procedure?

3 MS. BELL: Expert discovery is still open in a
4 number of cases, Your Honor, separate from the fact
5 discovery.

6 THE COURT: How many? I know in Ms. Chaitman's
7 cases it's still open, right?

8 MS. BELL: And I think Mr. Kratenstein's case, for
9 example, those two cases expert discovery is open there. I
10 don't have an exact number. But in those cases certainly to
11 the extent that the Trustee would -- and I think this
12 highlights the problem going forward on lack of a full
13 record. Because the additional information that Mr.
14 Dubinsky has been reviewing will be part of an expert report
15 then.

16 THE COURT: So, let me ask you a question.
17 Because now I realize that the thing I was concerned about
18 has occurred already. Mr. Madoff, who was deposed, said a
19 lot of things but there were a lot of Defendants that
20 couldn't participate in that.

21 MS. BELL: Or chose not to, Your Honor. They had
22 the opportunity, and I just want to address that.

23 THE COURT: Even when discovery was closed they
24 had the opportunity?

25 MS. BELL: Well, when the discovery was closed

1 they did not have the opportunity --

2 THE COURT: Okay, so let me just stop you. So,
3 there are people, there are entities or Defendants who did
4 not have the right to participate in the Madoff deposition,
5 right?

6 MS. BELL: Well, Your Honor, from the group of
7 objecting Defendants, there are about four or five cases
8 that would fall into that category and they're represented
9 by Ms. Chaitman and Ms. Neville. So I think that's a
10 hypothetical concern that the Defendants have raised. I
11 don't think it's a real issue before the Court.

12 But with respect to Mr. Kajon's point on Legacy,
13 and I want to address that because that's the sixth case
14 where discovery is closed in the Trustee's view -- he did
15 not get to participate in Madoff's deposition. We offered
16 him the opportunity to participate and he declined.

17 More than that, Your Honor, and I have from a
18 transcript of June 2017 where Mr. Kajon before this Court
19 says, "Some new evidence has come to light. Some new
20 evidence has come to light just this week that raises some
21 questions in our mind." And that new evidence, he cited to
22 Mr. Madoff's deposition.

23 And so it is disingenuous then to say that if Mr.
24 Madoff's deposition goes forward and you choose not to
25 participate, you can use the information that comes out of

1 that deposition to then challenge the Trustee's expert and
2 the Trustee --

3 THE COURT: We can argue about whether what Madoff
4 says is hearsay in a case where somebody hasn't
5 participated.

6 MS. BELL: And I agree with that, Your Honor, but
7 I think the point is the issue that Mr. Kajon raised is the
8 issue of treasuries. That's an omnibus issue. So, again,
9 in the interest of efficiency, it just doesn't seem to make
10 sense to proceed with these on a piecemeal basis.

11 THE COURT: Well, maybe -- maybe the underlying
12 assumption that this can be tried as a consolidated issue is
13 not right.

14 MS. BELL: And so we've taken that off the table,
15 Your Honor. And so now we're just dealing with discovery.

16 THE COURT: No, but if it can't be tried as a
17 consolidated issue, I don't have to necessarily consolidate
18 discovery. I mean, yes, Dubinsky will be deposed once,
19 Greenblatt -- Greenblatt and Galura to some extent have
20 things to say in individual cases.

21 MS. BELL: That's right, Your Honor.

22 THE COURT: And maybe it's a two-day deposition or
23 two-part deposition. One is the general what she did or
24 what he did, and then if people want to take the depositions
25 in individual cases, they can do it. I don't know, you

Page 52

1 know, really why it's necessary but --

2 MS. BELL: I think that's right, Your Honor.

3 We've had Mr. Dubinsky -- Ms. Galura's deposition taken in

4 at least one of these cases and we've certainly had Mr.

5 Greenblatt's deposition as well, I think. And I can't

6 recall if any of these counsel participated. But to the

7 extent that the Court would like the Trustee to make a Rule

8 16 motion, we're prepared to do that. This motion was made

9 pursuant to, again, the dealings and the understanding when

10 we review the transcripts in connection with Mr. Madoff's

11 deposition. And so the Trustee is prepared to make a Rule

12 16 motion.

13 We've had counsel who refused to agree to extend

14 discovery that closed in July with the argument that the

15 omnibus proceeding would deal with many of these issues.

16 And so --

17 THE COURT: Again, I'm perplexed that the Trustee

18 wants to take the discovery on something the Trustee should

19 know and the Defendants are fighting it. As I said, this

20 seems to be a reversal. Is there any other Defendant that

21 wants to be heard?

22 MR. RICH: Good morning, Your Honor. Robert Rich,

23 Hunton Andrews Kurth, on behalf of Edward (indiscernible)

24 and certain other individual Defendants. I just want to

25 address quickly and hopefully put to bed the issue of

1 whether, you know -- that it's just our argument that this
2 has been on the table. It's actually the Trustee's
3 argument. They've used it over and over.

4 THE COURT: What argument? Which argument?

5 MR. RICH: The argument that this Ponzi -- the
6 things that they want discovery on, this Ponzi scheme is a
7 new issue that they should have discovery on. I actually
8 tried. I asked for discovery on this exact issue a year ago
9 when I started seeing that, yes, there were securities
10 traded in our account. And I wanted more information. And
11 I wanted more information --

12 THE COURT: Okay, but that was what led to Mr.
13 Madoff's deposition.

14 MR. RICH: No, I'm sorry, Your Honor. This is
15 after the deposition. This is just last year. After the
16 deposition was taken, I said, there's a lot of good
17 information here. I see there's securities -- I now wanted
18 a little more. And I want to use that same paragraph that
19 they want to use, that I should be able to move for more
20 discovery. I want some more trading records. I want some
21 treasury transactions. This is what Ms. Bell said they're
22 looking for.

23 This is what they said. They said, well, the
24 deposition -- this is in their brief -- they said, the
25 deposition order provision permitting follow-up based on

1 Madoff's deposition should be construed only as permitting
2 discovery that could not have been pursued without his
3 discovery. I said, surely the Defendants did not need
4 Madoff's deposition to justify a request for documents
5 regarding securities trading. And the court denied my
6 request.

7 Over and over they said, in the case management
8 order, fact discovery is done; it doesn't matter what Madoff
9 said in his deposition, this issue has been in the record.
10 And on that basis, the Court denied my request. They're
11 relying on the exact same language and asking for fact
12 discovery and the exact same things. My Defendants -- I
13 have two Defendants that have exposure of \$70,000. They
14 can't go through 12 more depositions because they don't want
15 to reopen.

16 THE COURT: Well, all right. You have no open
17 discovery cases? Your cases are closed?

18 MR. RICH: My case is closed. We have one expert
19 discovery that we noticed but the deadline -- the other
20 one's closed.

21 THE COURT: Who is that?

22 MR. RICH: That's for Mr. Greenblatt.

23 THE COURT: Okay. But you wouldn't participate in
24 the Dubinsky deposition. You never noticed it before
25 discovery was closed, right?

1 MR. RICH: That's right.

2 THE COURT: All right.

3 MS. BELL: But he participated -- the case
4 participated in Madoff's deposition, Your Honor, and we
5 allowed a number of cases on day two of the deposition to
6 come in to the deposition although discovery was closed --
7 the discovery cutoff had passed in their case.

8 So, again, I think that there is some one-
9 sidedness here that, you know, we would appreciate if the
10 Court takes notice of. Because the Trustee has allowed
11 discovery in cases where it's been closed and we're not,
12 again, asking for something new; we're asking for a
13 continuation.

14 THE COURT: But these Defendants don't want more
15 discovery. I keep coming back to the same issue. They're
16 ready to try their cases. And if they haven't gotten
17 records that Ms. Chaitman thinks she needs, well, that's
18 going to be their problem, not yours.

19 MS. BELL: I think that's right, Your Honor, and
20 so it's the Trustee's position that if we were to use some
21 of those witnesses at trial or those documents that we would
22 like to, we think, go to the issues that Mr. Madoff is
23 raising, then there can be no objection on the Defendants'
24 part that the Trustee did not give them access to these
25 witnesses that we don't have control over, but certainly

Page 56

1 access to the documents that we'll use in any deposition.

2 MR. RICH: Your Honor, this is a complete 180 from
3 the exact argument they made a year ago. They realized
4 their case is weak. They're seeing that, oh, wait, he
5 traded the securities that my Defendants have on their
6 statements? We need to get more discovery to refute it. So
7 all of a sudden they have a new argument. It should be
8 denied.

9 THE COURT: Okay. Mr. Kirby?

10 MR. KIRBY: Thank you, Your Honor. Richard Kirby
11 on behalf of one of the only open case I have where
12 discovery is 100 percent open. We have an open discovery --

13 THE COURT: I'm sorry. It's open in your case?

14 MR. KIRBY: 100 percent open fact discovery case.

15 THE COURT: Which case is that?

16 MR. KIRBY: It's (indiscernible) BM Investments.

17 THE COURT: Okay. And how many cases do you have?

18 MR. KIRBY: All my other cases are in -- have been
19 decided on summary judgment --

20 THE COURT: Okay, so you've only got one case
21 left, right?

22 MR. KIRBY: Right, right. Okay. And there's two
23 issues I'd like to raise. The first issue I think is a
24 threshold issue, is whether -- if there's going to be such a
25 proceeding.

1 THE COURT: I agree with you. That's really
2 what's driving all this.

3 MR. KIRBY: Because if we wait -- our cases, which
4 were the South Ferry and Lowry cases, were set as selected
5 and tried as a test case. They're pending before Judge
6 Engelmayer at this point. He has a hearing scheduled for
7 August 28th. We can assume that he will decide certainly
8 before the end of the year. And the case will either be
9 decided one way or another, and either side's going to take
10 --

11 THE COURT: But then it's going to go up to the
12 Second Circuit, so --

13 MR. KIRBY: Right. But by one or other side.

14 THE COURT: Years away from a resolution of this
15 issue.

16 MR. KIRBY: Certainly probably through the end of
17 '19 is what I would expect. But the issue -- and so, we
18 think those threshold issues make all of this question of
19 how far back you go irrelevant, especially the issue of
20 whether the statute of repose limits the Trustee's reach
21 back altogether.

22 And that issue on -- with all due respect, we
23 disagree, but there are 16 bankruptcy judges who said it's a
24 statute of repose. So, it's very possible that Judge
25 Engelmayer's decision could split on the issue. Okay? So,

1 our first request is that this is premature. We should
2 wait.

3 THE COURT: All right, but I'm --

4 MR. KIRBY: I understand --

5 THE COURT: You know, I just can't hold up all
6 these cases, particularly for people who haven't made that
7 argument.

8 MR. KIRBY: Okay. Your Honor, the second issue
9 relates to the specific issue in the proposed order of the
10 Trustee. And that particularly -- that proposed order...
11 Let me just get my copy of the proposed order here.
12 Particularly, I want to point Your Honor out to Footnote 1
13 of the proposed order.

14 THE COURT: Footnote 1. Okay.

15 MR. KIRBY: Capitalized terms but not defined
16 herein shall have the meeting described to them in the
17 motion. There is throughout this proposed order reference
18 to what's called a Ponzi scheme issue. But if you go to
19 Page 2 of the Trustee's original motion --

20 THE COURT: I'm there.

21 MR. KIRBY: -- original motion, they have -- they
22 define that term, Ponzi scheme. They call it the Ponzi
23 issue. And they define it in terms of -- at all relevant
24 times because... And because of the Ponzi scheme, one, in
25 connection with the transfers of fictitious profits to each

1 Defendant listed during the two years preceding; and, two,
2 in calculating Defendants' fictitious profits.

3 That's not what -- all this discussion that you've
4 heard this morning has nothing to do with the question of
5 how you calculate. The question is when was there -- is the
6 Trustee able to establish his *prima facie* case of fraud?
7 Okay?

8 THE COURT: The rest of it is -- it's basically
9 saying calculating fictitious profits, did the Trustee
10 properly determine that the customers shouldn't get credits
11 for any purchases or sales which appeared on this statement,
12 which we include purchases and sales in the convertible
13 arbitrate scenario, or in the treasury scenario, so --

14 MR. KIRBY: I think the question -- our view is
15 that if there's going to be an order and if there's going to
16 be an omnibus proceeding, it should be limited to whether --
17 what the scope of the fraud is. Because that is the
18 question that the statute provides.

19 THE COURT: What do you mean by the scope of the
20 fraud? This all came about when there was a dispute as to
21 when the Ponzi scheme started and, indeed, whether or not
22 there was a Ponzi scheme or whether there was a hybrid.

23 MR. KIRBY: But the problem is that Ponzi scheme
24 is not a defined and accepted term. And so I think the
25 proper way to proceed and particularly not have something

Page 60

1 incorporated by reference in which there's confusion in the
2 proposed order, that they should just use the language of
3 the statute: whether the Trustee is able to establish the
4 elements of fraud under 548A1A. And that is --

5 THE COURT: The Trustee can make a prima facie
6 case without any of this discovery. Now --

7 MR. KIRBY: Which is my point and it's been my
8 point -- why I was prepared to stipulate to the issue in the
9 other cases. In my view, this is a frolic and detour. But
10 I can't speak for all the Defendants.

11 THE COURT: Well, you have stipulated to the
12 existence of a Ponzi scheme, though. And we have people
13 here who are saying there was no Ponzi scheme, or there was
14 a hybrid scheme, where he did purchase some securities which
15 appear in customer statements.

16 In other words, you were willing to stipulate to
17 what this whole fight is about.

18 MR. KIRBY: Exactly. But what's now being -- and
19 in my view, that's only half the question. And that's, of
20 course, what the Court of Appeals will decide or the
21 Appellate Courts will decide. But in any event, I don't
22 think that the second issue, how you go about calculating
23 it, has anything to do with whether there was a fraud or
24 not. That's a completely separate issue.

25 THE COURT: Well, putting aside what the order

Page 61

1 says, what's your -- do you pose a consolidated proceeding,
2 or do you think it's impractical for the reason I've raised?

3 MR. KIRBY: It's ultimately ironic because we
4 asked years ago to consolidate these issues in the Cohen
5 case and it was all denied. Now they want to move around
6 and suggest that these be consolidated. In my view, and I'm
7 totally opened --

8 THE COURT: In which case?

9 MR. KIRBY: In the Cohen case --

10 THE COURT: You want to intervene to argue that
11 antecedent indebtedness was a defense. That's not what this
12 is about.

13 MR. KIRBY: I understand.

14 THE COURT: You're litigating that issue now.

15 MR. KIRBY: I understand. But that is -- to the
16 extent that there's -- I have no objection with fully open
17 discovery. I don't want it delayed for ever. But I have no
18 objection to there being consolidated discovery on the
19 similar issues in my open case. But the form of what the
20 issue is and how that's phrased, we have a specific concern.

21 THE COURT: Okay.

22 MS. BELL: Your Honor, just a couple of quick
23 points. One is the procedural posture of the case is now --
24 we're driven by a number of different things. And so I
25 think it's unfair to say that because we didn't consolidate

1 before, we shouldn't consolidate now. It's an opportunity
2 for us to streamline these issues.

3 I think with respect to the expert deposition, and
4 the Court had a question about how many expert reports were
5 still outstanding -- and it depends on how you -- if it's
6 under the case management order, there's somewhere around,
7 as of today, 24 of the 105. And I think this is a great
8 opportunity to correct the numbers with respect to Ms.
9 Neville's presentation. This argument is about the 105
10 objecting cases; it's not about all the remaining good faith
11 Defendants. Because the other 40-plus did not object. And
12 so the numbers that we're giving to the Court today are
13 really around that 105.

14 But if expert discovery is open in 24 or so, now,
15 that doesn't count in Ms. Chaitman's cases where there's an
16 order on file, where in a number of her cases we have not
17 served expert reports. And so that -- again, that's an
18 opportunity for us to streamline these issues. Because to
19 the extent that the experts are doing additional work, then
20 whatever report is served will reflect their current -- the
21 access to documents that they've had and their current
22 opinions after reviewing those documents.

23 THE COURT: Their opposition implies that if you
24 served expert reports in cases where discovery is still
25 open, they're not going to take -- you know, they don't want

1 to take the discovery of that expert.

2 MS. BELL: But that's not how expert discovery
3 works, Your Honor. That's not Rule 26.

4 THE COURT: But so what? I come back to the same
5 question. Why is that the Plaintiff's problem? If they
6 don't want to take discovery of your case, why are you
7 insisting on reopening discovery?

8 MS. BELL: Because the burden is the Trustee's, as
9 the Defendants pointed out in their objections, Your Honor.

10 THE COURT: But you can make out your *prima facie*
11 case pretty simply where there's allocution -- I understand
12 his allocution only speaks around 1992. And I've been told,
13 by the way, countless times that the start date doesn't
14 matter for a lot of these cases. But his allocution -- you
15 have his allocution. What else do you need? And you have
16 the reconstruction of the principal balance calculations by
17 Mr. Greenblatt. What else do you need?

18 MS. BELL: Absolutely, we agree, Your Honor. And
19 we have the allocution not just of Mr. Madoff, but of Mr.
20 Lipkin, Mr. Kugel, Ms. Pitts. We have a number of other
21 allocutions that would certainly -- and we, the Trustee was
22 successful in getting summary judgment on a similar issue,
23 on what we call the Katz (indiscernible) case, where a Ponzi
24 wasn't stipulated to, and we got fictitious profits there.
25 And we submitted a mountain of evidence. And then so we

1 agree with the Court that we could sufficiently --

2 THE COURT: I thought that was settled.

3 MS. BELL: It was, after we got summary judgment
4 on the fictitious profits amount, and then there was still
5 the amount above the principal. So the Trustee reached a
6 settlement. But I think, Your Honor, the point is it's not
7 whether we can -- because we agree that we can sufficiently
8 prove -- and, you're right, the admissible evidence that we
9 have carries the day. I think it's proceeding on different
10 factual records. Because in the cases that are open, we
11 will produce documents and have depositions of witnesses.
12 Because Mr. Madoff's testimony, which is demonstrably false
13 -- I think the Trustee should be allowed -- afforded the
14 opportunity to go forward with fact witnesses that can
15 counter. Mr. Madoff mentioned specific names in his
16 deposition, and it was always contemplated that we would
17 have the opportunity to do that.

18 I think any decision by the Court on expert
19 discovery, just so that we're not here on that issue again,
20 I think at the very least, the orders are clear that as to
21 the Trustee, those reports and any expert opinions will be
22 tabled until after Madoff's deposition. And so I would
23 assume that the Defendants would not have the same arguments
24 with respect to the expert process as they do on the fact
25 discovery piece.

1 MS. NEVILLE: Your Honor, I have one point to
2 make. Carole Neville. When we exchanged discovery
3 initially, what we got from the Trustee basically was bank
4 statements and other documents from their records showing
5 demands for our redemptions, etc., and access to a database.

6 What we have learned in this process is that the
7 Trustee withheld all the trading records from that database,
8 or a good number of them. And, believe me, I have searched
9 them. Really searched them.

10 So, my point about this order is that I don't want
11 to reopen discovery but I do think that the Trustee has an
12 obligation to produce what he has been withholding for ten
13 years. Because the story that he's been telling for ten
14 years, as I keep on saying, was hatched in the first days of
15 the cases and supplemented, and supplemented, and
16 supplemented. And there's another whole story which we have
17 developed from the records that we have already been given
18 but there are of them.

19 So, I think that this is all subterfuge so that
20 the Trustee, who promised even in June that he was going to
21 produce these things to us or make them available, still
22 hasn't done it.

23 THE COURT: I'll give you the last word.

24 MS. BELL: So, Your Honor, I still -- just from
25 what Neville just said, I'm confused about whether

1 Defendants want more documents or they don't.

2 THE COURT: Well, they want the discovery that was
3 timely requested or they want you to supplement the
4 discovery that was timely requested.

5 MS. BELL: We're not currently engaged in any
6 discussions with Ms. Neville about discovery that was
7 requested, unless it's their position that any request by
8 Ms. Chaitman extends to all of the Defendants.

9 MR. KRATENSTEIN: If I may, Your Honor, Andrew
10 Kratenstein for the Sage Defendants. What I just hear Ms.
11 Bell say a few moments ago was that what they're going to do
12 if things proceed as they appear they're going to proceed,
13 is they're going to -- in cases where expert reports have
14 not been put in at least, put in -- give to us a whole bunch
15 of new documents and have their experts rely on them.
16 That's what I understand them to be doing. And --

17 THE COURT: Or there may be supplemental reports.

18 MR. KRATENSTEIN: Or there may be supplemental
19 reports. And we'll deal with that at some other time. But
20 if they're going to do that, then they need to produce the
21 documents to us. So that's what has to happen, right? If
22 their experts are going to rely on the documents, we have to
23 see them. Clearly, that has to happen.

24 THE COURT: So, you don't have any objection in
25 your individual cases to them filing an expert report

1 tomorrow in a case where discovery is closed, and you don't
2 have a right to depose that expert?

3 MR. KRATENSTEIN: No, no. They can't have it both
4 ways. They can't have it both ways.

5 THE COURT: So, if information comes up in cases
6 where discovery is still open, you want to reopen discovery
7 in your cases?

8 MR. KRATENSTEIN: No, I do not want to reopen
9 discovery in my cases.

10 THE COURT: All right.

11 MR. KRATENSTEIN: Let me be very clear. I'm going
12 to just go back. A year ago tomorrow, you noted something
13 in our cases, which is, by the way, another reason why this
14 is all different -- which is my clients actually directed
15 trades, unlike everybody else here. So I have this whole
16 other argument that nobody has that we have to deal with.
17 And they've known about that for a long time.

18 So, in my cases, expert discovery is -- fact
19 discovery is closed, expert discovery is still open.
20 They're going to put in expert reports. I don't know what
21 they're going to say. Okay, yeah, I've seen Dubinsky's old
22 report -- I don't know what they're going to do next.

23 But if what they're going to do is, now all of a
24 sudden through the proverbial backdoor after fact discovery
25 is over, produce a whole bunch of stuff that we've never

1 seen, I mean, I think that that's unfair. I don't want to
2 take more in fact discovery.

3 THE COURT: But isn't that possibly inevitable if
4 you have some cases where discovery is still open and the
5 Trustee can still put in, let's say, expert reports or even
6 factual discovery --

7 MR. KRATENSTEIN: The factual records -- my view -
8 -

9 THE COURT: Which you may never requested but you
10 think is relevant to your case.

11 MR. KRATENSTEIN: Well, we all have requested it.
12 But the factual information that the experts rely on should
13 be the factual record in that particular case.

14 THE COURT: Well, they do have to make the
15 information available to you if they're going to -- without
16 regard to discovery, by the way, if they're going to use the
17 expert's report in your case.

18 MR. KRATENSTEIN: Clearly. And we can have that
19 debate. What should happen here, in my view, is that fact
20 discovery in the cases where it's closed is closed, and for
21 all the experts, I agree with you completely -- there should
22 be one Dubinsky deposition. And if there are other expert
23 depositions over multiple cases, there should be one
24 deposition. But that's what should be coordinated to the
25 extent there's coordination.

1 THE COURT: All right. And should, for example,
2 Dubinsky is the example we're using -- should the Dubinsky
3 deposition proceed immediately even though fact discovery is
4 still open in some cases?

5 MR. KRATENSTEIN: I don't see -- well, in my case
6 it can't proceed immediately because they haven't served
7 Dubinsky's report in my case. So, in my case I can't do
8 that immediately.

9 MS. BELL: And that's precisely the point, Your
10 Honor. The Trustee would not need to supplement in cases
11 where expert report is still open, because the experts will
12 indicate any documents they've considered in connection with
13 the opinions that are being rendered in the case. And so I
14 think the fact that the expert -- there's a reason the
15 expert date is different than the fact discovery date in
16 these case management orders.

17 I think to the extent that the Court is concerned
18 about opening -- reopening discovery, I think I just want to
19 remind the Court that it's the Trustee's position that the
20 fraud proceeding is underway and the request for this
21 additional discovery is part of that fraud proceeding. To
22 the extent that the Court would like us to make a Rule 16
23 motion, we're prepared to do that, where we go through the
24 factors of Rule 16. And we can do that on a case by case
25 basis to the extent we see fit. And that's something we'll

1 evaluate.

2 THE COURT: All right. Look, I'm not going to
3 grant this motion on the state of this record. The order on
4 which this is all predicated -- there are actually two of
5 them, but the first Madoff deposition order said -- in
6 Paragraph 11 -- it says, "As to the participating customers
7 whose fact discovery is set to close on or after the date,
8 the Court extends fact discovery for the limited and sole
9 purpose of taking Madoff's deposition."

10 It then says, "Other than for that purpose, the
11 deadlines in the applicable case management orders remain
12 unchanged, notwithstanding the dates set forth in the case
13 management orders. Counsel for the Trustee, the
14 participating customers, the Picower parties, and SIPC have
15 the right to move the Court for further discovery based upon
16 Madoff's testimony."

17 If you're going to make that motion, you have to
18 show specifically what it is Madoff said that's new, that
19 you couldn't have anticipated with due diligence of taking
20 that discovery. I'm being told -- and part of the problem
21 of this process is people tell me a lot of stuff, and it's
22 not contained in a pleading. But I'm told that some of
23 these issues were always issues in the case and at some
24 point, somebody got the idea they wanted to take Madoff's
25 deposition. I don't even know how that -- I don't recall

1 how that originated. With Ms. Chaitman, all right. And we
2 limited it to cases where discovery was still open.

3 I'm not inclined to reopen discovery for another
4 year, certainly in cases where discovery is closed. To the
5 extent that discovery is still open or you have a duty to
6 supplement or something like that, your proposed order sort
7 of wipes all that out and starts everything anew. And
8 that's not right.

9 Expert discovery we can deal with to the extent
10 it's still open. People can go in on one day and take
11 Madoff -- take Dubinsky's deposition. I don't know if you
12 want to take the deposition Mr. Rich put in. I forget his
13 name. Friedland?

14 MS. BELL: Mr. Greenblatt.

15 THE COURT: No, no, no. What was your expert's
16 name? Friedland?

17 MS. BELL: Feingold.

18 THE COURT: All right, Feingold.

19 MR. RICH: Mr. Feingold. But their deadline to
20 depose in my cases expired.

21 THE COURT: Has your deadline to depose Mr.
22 Dubinsky expired?

23 MR. RICH: Yes.

24 THE COURT: Okay. Well, deadlines have expired,
25 they've expired absent the modification of the order. But a

1 lot of these expert reports have been out there forever and
2 there were expert discovery deadlines set. But, again, I go
3 back to the orders which authorize Madoff's deposition,
4 which is the starting point you have to show in order to
5 reopen discovery in any case that he said something that
6 would be cause to reopen the case.

7 I am also having second thoughts about a
8 consolidated proceeding, although I agree with you, it is
9 certainly the most efficient way to deal with the issue.
10 There may be practical problems with it. Depositions that
11 have been taken, for example, I use the Madoff deposition,
12 and you're going to tell me you invited people and I don't
13 know what effect that has. But the Madoff deposition,
14 whether it can be used in all cases, particularly those
15 cases where discovery was run and people didn't have the
16 right under the order to participate in it. There may be
17 other discovery which was taken in an individual case. I
18 don't know what that might be but -- I'm told Ms. Galura was
19 deposed. Or Mr. Greenblatt was deposed a couple of times.
20 I don't know what he or she said, but I don't know if you
21 can use that in the other cases.

22 So there may be a practical problem, which is
23 really, as I said, what's driving this notion of reopening
24 discovery and having a consolidated discovery proceeding.
25 Because if we can't have a consolidated proceeding, we don't

1 need this consolidated discovery. We'll just do it on a
2 case by case basis or a group of cases to the extent it
3 makes sense. So that if Ms. Neville has 13 cases and your
4 direct case -- to a large extent her defenses are the same
5 in every one of those cases, yeah, we can try those together
6 or consolidate those issues.

7 MS. BELL: And the Trustee is prepared to move
8 forward, Your Honor, on a case by case basis. I just want
9 to bring the Court back -- I know you said two orders.
10 There is a third order, Ms. Chaitman's April -- August 10,
11 2017 order that left all the dates in abeyance with the
12 exception of the three motions to withdraw the reference
13 cases. And it expressly outlined the expert report. And so
14 it's the Trustee's view that whatever decision the Court
15 renders today, if there can be a carve out for Ms.
16 Chaitman's cases, because they're to be handled separately
17 just under this order and it's separate from --

18 THE COURT: She retained the right under that
19 order -- there was the issue of the subpoenas on the
20 traders.

21 MS. BELL: Yes, Your Honor.

22 THE COURT: Right. So those were timely served.
23 And that's just a discovery issue.

24 MS. BELL: But the Trustee has not been serving
25 expert reports under this order because our reading of the

Page 74

1 order -- and we've communicated as much to Ms. Chaitman, and
2 there was no --

3 THE COURT: What other expert? What's the answer?

4 MS. BELL: Well, we haven't served any expert
5 reports in those cases. And so the Trustee will serve --
6 we've been holding those dates in abeyance in accordance
7 with that August order, because in our view, we would
8 revisit all of this at the end of Madoff's deposition and so
9 dates would be set at that time, which is now. If we agree
10 that Madoff's deposition is --

11 THE COURT: Do you want me to just set a schedule
12 for expert discovery? Or expert depositions?

13 MS. CHAITMAN: Your Honor, I'm going to take up
14 your offer that I file a Motion to Compel. I haven't
15 completed --

16 THE COURT: I'm not offering it. I'm just saying
17 you can always file a Motion to Compel.

18 MS. CHAITMAN: Yes. No, no, no, I understand.

19 THE COURT: I told you the last time, though, and
20 I'll reiterate so there's no confusion, that if Judge Moss
21 put a procedure in place to narrow the issues and you're
22 going around that, you may lose the motion and you may
23 suffer an award against you of attorneys' fees and costs.
24 That's what I said the last time. Okay?

25 MS. CHAITMAN: Okay. But the point is fact

Page 75

1 discovery is open in my cases. So, until we resolve the
2 issue of the Trustee's production of the documents that have
3 been withheld, we're not prepared to file expert reports.
4 We can't possibly.

5 THE COURT: All right. I suppose it's academic if
6 they make a motion and discovery is reopened in all the
7 cases. But, you know, I think you have to make a motion and
8 identify specifically what it is that Madoff said that
9 triggers the need to reopen discovery in all of the cases.
10 And I think that motion's going to have to be on limited
11 issues. I'm not going to reopen discovery generally.
12 Nothing I've said today has anything to do with outstanding
13 discovery requests, with the duty to supplement or anything
14 like that.

15 MS. BELL: Okay, Your Honor, just for
16 clarification, is the Madoff deposition officially over?
17 And I --

18 THE COURT: As far as I'm concerned, did everybody
19 have an opportunity to question him? The fact that they
20 reserved their rights on the record doesn't mean anything to
21 me.

22 MS. CHAITMAN: The reason I wanted to take
23 Madoff's deposition was to question him about the trading
24 records, and I've gotten maybe one percent of the trading
25 records. And let me explain to you what the importance is.

1 THE COURT: You can make that motion when the time
2 comes, but I think you're going to be hard-pressed to
3 convince me that he should be deposed yet again.

4 MS. CHAITMAN: You know what the problem is,
5 Judge? What we've been able to establish is we can match
6 CUSIP numbers on customer statements with CUSIP numbers on
7 confirmations of the purchase of T-bills with investment
8 advisory customers' money. We want to be able to do that
9 with securities. I have been able to do it with some
10 securities -- when I say securities, I mean, Fortune 100
11 companies.

12 THE COURT: I have a suggestion that I thought
13 about. You have how many cases?

14 MS. CHAITMAN: 70 something.

15 THE COURT: Why don't you pick -- see if you can
16 agree on a sampling and just get -- look for the documents
17 as to those particular purchases we're talking about, and
18 see if we can try a sample of your cases.

19 MS. BELL: Your Honor, the issue's a little more
20 complicated than that because if Ms. Chaitman is matching
21 CUSIP numbers in one customer statement to what is reflected
22 on the brokerage account statements, she's matching it for
23 one account. Madoff used those same CUSIP numbers as
24 against hundreds of accounts. And so --

25 THE COURT: You know what? You're going to say he

1 never purchased securities. She's going to come forward and
2 show that the CUSIP number that was purchased, I guess, for
3 a House 5 account also matches a CUSIP number on a customer
4 statement or a trading confirmation.

5 MS. CHAITMAN: But when you say a House 5 account,
6 it was purchased for BLMIS.

7 THE COURT: I understand that. But the whole
8 point of this is allocation. And what Ms. Bell is saying
9 is, yeah, that's all well and good but he allocated that
10 same purchase of one T-bill to 200 accounts. That's
11 basically what she's saying. But you'll have to show that.

12 MS. BELL: Yes, Your Honor. And we're prepared to
13 do that.

14 THE COURT: Yeah, you don't need more discovery to
15 do that, though?

16 MS. BELL: I think we have what we need in the
17 record to do that, and we have experts who will testify on
18 that, experts who've been disclosed. I think, Your Honor,
19 with respect to the -- I think just clarification in terms
20 of Ms. Chaitman's expert disclosure date, so that when we
21 leave here today we have a clear sense of how we're
22 operating.

23 So, again, Ms. Chaitman has said that she needs
24 more time to review documents before Mr. Madoff's deposition
25 could be completed. And just to look back, at the time we

1 produced a number of records in connection with the
2 microfilm dispute that we had last year, and Ms. Chaitman
3 asked for more time to review those records so she could go
4 depose Mr. Madoff. She took 25 minutes of his deposition
5 and then she was done, and then did five minutes of cross.

6 And so I think, you know, to the extent that this
7 production issue further delays the case, I would request
8 that the Court limits that.

9 THE COURT: Well, the simple answer to that is
10 just to schedule Dubinsky's deposition, and in the interim
11 you can either make your Motion to Compel or you can go back
12 to Judge Moss, which is what I think you should do since he
13 put this procedure in place --

14 MS. CHAITMAN: I will go back to Judge Moss --

15 THE COURT: -- and he will --

16 MS. CHAITMAN: If Judge Baker had not agreed to
17 give me the documents, I would have gone back to Judge Moss
18 already.

19 MS. BELL: But we have not served Mr. Dubinsky's
20 deposition yet because fact discovery --

21 THE COURT: Well, why don't you serve it?

22 MS. BELL: We typically have a 60-day period
23 between -- because we have to have whatever documents are at
24 play before the expert reports are due. And so there's a
25 60-day period between the close of fact discovery and expert

1 discovery in every case management order.

2 THE COURT: So what do you do -- you're saying
3 she's stretching it out, but you're saying you can't serve
4 your expert report and we can't have expert discovery until
5 this document dispute is resolved, right?

6 MS. BELL: Until we --

7 THE COURT: So, what do you propose?

8 MS. BELL: Until we determine that fact discovery
9 is closed. And so I think, Your Honor, that we need to
10 decide what constitutes the end of fact discovery.

11 THE COURT: Okay, fair enough.

12 MS. BELL: And I don't know what that is today.
13 And perhaps a further discussion? She also has outstanding
14 the trader subpoenas, and it's our view that that's part of
15 fact discovery and the experts should be given an
16 opportunity --

17 THE COURT: Don't the case management orders in
18 each case determine when fact discovery is over?

19 MS. BELL: But those dates have expired, I think,
20 as we just agreed, and Ms. Chaitman has outstanding trader
21 subpoenas, for example. She wants to take depositions.

22 THE COURT: Okay.

23 MS. BELL: The experts would need to get the
24 benefit of that -- those depositions before we have to
25 render an expert report. And so fact discovery -- expert

Page 80

1 discovery is after the close of fact discovery typically.

2 THE COURT: And you oppose her taking those
3 depositions if, for no other reason, you want a consolidated
4 proceeding in which everybody attends those depositions?

5 MS. BELL: Well, we thought it would make sense,
6 Your Honor. For example, she had David Kugel on the list of
7 27 traders. He has a plea allocution and he testified at
8 the criminal trial. There are a number of issues that will
9 go across cases. And so we think it's not efficient to
10 proceed with those --

11 THE COURT: Why don't you make your motion to
12 modify the pretrial orders to reopen discovery?

13 MS. BELL: Yes, Your Honor.

14 THE COURT: And do that expeditiously. Now, with
15 respect -- there's got to be a time limit, though, Ms.
16 Chaitman, with you doing something about this issue.

17 MS. CHAITMAN: I will make the motion -- Judge, if
18 Baker had not indicated to me that they would produce all
19 the trading records without my going back to Judge Moss, I
20 would have done it already. But I will go back to Judge
21 Moss, but I'd like to be able to proceed with the subpoenaed
22 depositions. The traders have both documents and testimony.

23 THE COURT: I think I want to decide the Trustee's
24 motion first, because everybody's going to want to come to
25 Kugel's deposition, for example, if I reopen discovery. And

1 everybody may want to question Kugel. I don't know who
2 else, you know, is involved. Maybe Bongiorno. I don't know
3 --

4 MS. CHAITMAN: I was not able to serve a subpoena
5 on Kugel.

6 THE COURT: Pardon?

7 MS. CHAITMAN: I have not served a subpoena on
8 Kugel.

9 THE COURT: So, how many depositions do you -- how
10 many subpoenas have you served?

11 MS. CHAITMAN: You know, I don't have that number.
12 But I think it's -- I mean, I tried to serve 27. Kugel's in
13 prison, isn't he? I mean, I didn't serve him, so -- but I'd
14 like to be able to go forward with that discovery. I don't
15 --

16 THE COURT: But how many -- that's what I'm asking
17 you. How many are there?

18 MS. CHAITMAN: I think it's 12 that we actually
19 served. I'd like to go forward with those 12 depositions
20 and get the documents.

21 THE COURT: There's only two possibilities:
22 Either I have to hear her motion first or there's going to
23 be an interim procedure where anybody can opt in, regardless
24 of whether discovery is closed, if they want to attend those
25 depositions. But they'll be deemed to have attended them,

1 whether or not they opt in.

2 MS. CHAITMAN: Why don't we have the Trustee make
3 the motion and then --

4 THE COURT: All right.

5 MS. BELL: So, Your Honor, just a couple of
6 scheduling things. I'm on vacation for two weeks in August.
7 And so if we can defer that a little to --

8 THE COURT: Everybody's on vacation in August,
9 except me but --

10 MS. BELL: But just to address the point of
11 Kugel's deposition, the Trustee had --

12 THE COURT: You're the only lawyer working on this
13 case, right?

14 MS. BELL: No, Your Honor, but many --

15 THE COURT: I've seen your -- I've seen your
16 firm's fee applications.

17 MS. BELL: A number of other --

18 THE COURT: You must have a high billing rate. Go
19 ahead.

20 MS. BELL: A number of other folks who are on this
21 proceeding are also on vacation, Your Honor. But just with
22 respect to Kugel's deposition, I think the Trustee assumed
23 that Ms. Chaitman had served, and this is the first time
24 we're hearing that that deposition --

25 THE COURT: Well, he's in jail.

1 MS. BELL: Well, but, Your Honor, I think, though,
2 the point I'm trying to make is that the Trustee should be
3 accorded the opportunity, at least in Ms. Chaitman's cases,
4 to take Mr. Kugel's deposition because --

5 THE COURT: We can argue with that if we get to a
6 case by case determination, if I deny your motion or I limit
7 the issues. I mean, I've been hearing about Kugel's
8 allocution now for four years, so...

9 MS. BELL: Absolutely right, Your Honor. We
10 thought this would be an appropriate juncture to do that.

11 THE COURT: Okay.

12 MS. BELL: Mr. Shifrin is prepared to address, to
13 the extent the Court would like to hear, the specific
14 statements by Ms. Chaitman on trading records and what that
15 means and the status of that, if the Court is so inclined.

16 THE COURT: I don't want to hear another -- I
17 don't want to have another discovery conference on this
18 issue. As I said, I've had multiple discovery conferences
19 for two years, culminating last year when Ms. Chaitman said
20 she wanted to make a Motion to Compel. I suggested that the
21 better procedure might be to go back to Judge Moss, although
22 I never said you couldn't make a motion to compel, and I
23 would never say that.

24 And I'm being told that there were communications,
25 and the Trustee said he would turn over records, and I don't

Page 84

1 know what's happened, whether those statements were made or
2 if they were made, whether there was a follow-up to get the
3 records. I just don't know. I don't know if there's a
4 question of proportionality, if there's a question of who's
5 going to bear the cost of all this. I don't even know what
6 the cost is. For all I know, you can tell someone to come
7 into the data room and say, "Here, go have a look at 30
8 million documents. Just be out in an hour." I just don't
9 know.

10 And if you're going to argue that it's
11 disproportionate, you're going to have to explain to me
12 facts which tell me what the cost is and things like that.
13 Because I still remember I told you to go and look at 20
14 reels of microfiche. You looked at four.

15 MS. CHAITMAN: You're conflating two issues, Your
16 Honor, if I may --

17 THE COURT: Okay, but --

18 MS. CHAITMAN: The microfilm, we dropped the
19 microfilm, as I explained previously.

20 THE COURT: All right, so the microfilm is no
21 longer at issue?

22 MS. CHAITMAN: I explained that it wasn't
23 productive for us to go through the microfilm. There were
24 like, 5,700 microfilms --

25 THE COURT: So, these 30 million documents, can

1 they be searched?

2 MS. CHAITMAN: Yes.

3 THE COURT: With search terms?

4 MS. BELL: And I'll let Mr. Shifrin respond to
5 that, Your Honor.

6 MR. SHIFRIN: Good morning, Your Honor. Max
7 Shifrin on behalf of the Trustee. Yes, the documents in the
8 BLMIS database can be searched. And we have been searching
9 them for years. We have run dozens of search terms for Ms.
10 Chaitman, both what we've offered and ones that she's
11 offered, and we've produced those documents to her. So she
12 has access to the BLMIS database. She simply has to give us
13 purposeful, concrete, specific, reasonable search terms that
14 aren't bank names like Fidelity that return 3 million hits.
15 That's not a reasonable search term. That's --

16 THE COURT: Why don't you give them the CUSIP
17 numbers? See if they pop up.

18 MS. CHAITMAN: If I were that smart...

19 THE COURT: I'm sure you'll figure it out, Ms.
20 Chaitman.

21 MR. SHIFRIN: Your Honor, just to clarify a couple
22 of things here. The BLMIS database contains, literally, all
23 documents, hardcopy and electronic that were recovered from
24 all operative floors of the Lipstick Building.

25 THE COURT: Okay.

1 MR. SHIFRIN: They contain every electronic
2 document recovered from every hard drive, every floppy disk,
3 every CD, every loose paper in everyone's office. It
4 contains the full assortment of what employees at BLMIS kept
5 in their files and records. It contains, in short,
6 irrelevant information.

7 So, the notion that she and that any other
8 Defendant is entitled to 30 million documents irrespective
9 of relevance, just the wholesale production of these
10 materials is absurd and it would never be authorized in any
11 litigation.

12 THE COURT: Mr. Shifrin, there have been disputes
13 about what's relevant and not relevant in this case.

14 MR. SHIFRIN: That's true.

15 THE COURT: But if it takes two seconds to put a
16 search in, and you get 10 million hits with the search, and
17 then the question is who's going to pay for it, that's
18 something I can deal with. But if it doesn't cost anything
19 to put the search terms in and come up with those 10 million
20 hits, what difference does it make?

21 MR. SHIFRIN: Your Honor, we have no objection to
22 running reasonable search terms and producing those
23 documents.

24 THE COURT: Well, okay. All right. I don't have
25 the search terms before me. I don't know if they're

Page 87

1 reasonable or unreasonable, but if she wants to look at
2 every single document and it doesn't cost you anything, so
3 what?

4 MR. SHIFRIN: Well, Your Honor --

5 THE COURT: I'm just asking.

6 MR. SHIFRIN: Yeah, and I think there's an answer
7 to that. Rule 26 entitles litigants to relevant discovery.
8 So, the inherent in that request, 30 million documents,
9 irrespective of any relevance review or responsiveness
10 review, fundamentally will include a relevant discovery
11 that's not entitled under federal rules.

12 THE COURT: Okay.

13 MS. CHAITMAN: But it's like I've been getting
14 Chinese takeout menus. When I ask for -- I name specific
15 institutions and I get Chinese takeout menus. If they have
16 the database, Judge, there's no dispute about it, let them
17 give us access to it. It won't cost them anything.

18 THE COURT: Well, that's the question --

19 MR. SHIFRIN: She's complaining about Chinese
20 takeout menus. Now she's asking for 30 million more
21 documents? So, which one is it?

22 MS. CHAITMAN: I want access to the database.

23 THE COURT: Maybe she's hungry. Look, I've said
24 enough, all right? My own feeling is if she wants to go and
25 look at 30 million documents and it doesn't cost you

1 anything, let her look at 30 million documents, if that's
2 what she wants to do. That'll avoid a dispute about
3 relevance.

4 If she asks you for copies of 30 million
5 documents, she'll probably have to pay for it. That's a
6 different issue.

7 MR. SHIFRIN: That's true, Your Honor, but the
8 technical aspects of creating a database of 30 million
9 documents that's accessible to people just to walk in and
10 wander and run search terms is a little bit more complicated
11 --

12 THE COURT: All right, but I don't know that. You
13 have to explain that to me. Thank you. Thank you very
14 much. What I'll do is I'll just adjourn your motion sine
15 die with the anticipation that you're going to make a motion
16 under Rule 16.

17 MS. BELL: Great. Thank you, Your Honor.

18 MS. CHAITMAN: Judge, I don't want to beat a dead
19 horse --

20 THE COURT: But you will.

21 MS. CHAITMAN: Yes. But when you say he has to
22 explain to you -- you want me to go back to Judge Moss?

23 THE COURT: I think you should go back to Judge
24 Moss.

25 MS. CHAITMAN: Okay, okay.

1 THE COURT: That's all.

2 MS. CHAITMAN: Okay.

3 THE COURT: And you can explain to him.

4 MS. CHAITMAN: Okay, thank you.

5 THE COURT: All right. Thank you.

6 (Whereupon these proceedings were concluded at

7 11:42 AM)

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Page 91

1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

Sonya
6 Ledanski Hyde

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